IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs February 27, 2008

STATE OF TENNESSEE v. ROGER "BUCK" JONES

Direct Appeal from the Circuit Court for Cocke County
No. 9996 Rex Henry Ogle, Judge

No. E2007-01597-CCA-R3-CD - Filed March 14, 2008

The Defendant, Roger "Buck" Jones, pled guilty to one count of vehicular homicide, three counts of vehicular assault, one count of driving under the influence ("DUI"), one count of violating the registration law, one count of failure to obey traffic control devices, and one count of violating the financial responsibility law. The trial court sentenced him to eight years in prison as a Range I offender. The Defendant appeals only his sentence. Upon a thorough review of the record and applicable law, we affirm the trial court's judgment.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which JERRY L. SMITH and ALAN E. GLENN, JJ., joined.

Keith E. Haas, Newport, Tennessee, for the Appellant, Roger "Buck" Jones.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Sophia S. Lee, Assistant Attorney General; James B. Dunn, District Attorney General; Amanda H. Inman, Assistant District Attorney General, for the Appellee, the State of Tennessee.

OPINION

I. Facts

The Defendant's guilty pleas were a result of his driving, under the influence, through a red light; he hit one car, killing the driver and injuring her three children. As part of his guilty plea, the Defendant received an eight-year sentence. The only issue at the sentencing hearing was how the eight years would be served. At that hearing, the trial court heard the following evidence: Joy Fine, the deceased victim's mother, testified that her daughter, Amy Leatherwood, left behind three children: seven-year-old Logan Cash, and four-year-old twins, Siara Cash and Kiara Cash. Fine

stated that she felt as if she lost one of her best friends, and much change can be seen in the children. All three children were in the car when the victim was killed. Kiara was nearly potty trained at the time of the accident, but she has since reverted and uses the bathroom on herself. Kiara has additionally reverted to "baby talk." The other two children miss their mother very much. Fine stated that she wished the Defendant would spend all eight years in prison.

Lonnie Cash, Jr., the children's father, testified that Kiara was in the critical care unit for three weeks after the accident with a fractured skull and a broken nose. During that time, her brain began to swell, and she slipped into a coma for two and one-half weeks. The doctors put her on a ventilator, twelve intravenous tubes, and a feeding tube. Siara received cuts on her face and a number of bruises. Both Siara and Kiara still have scars on their faces.

Cash testified that, because Kiara fell into a coma shortly after the accident, she was unable to attend her mother's funeral. At the time of the hearing, Kiara continued to have nightmares, and she would require more physical therapy because she forgot much of what she physically knew. Logan also continued to have nightmares about the accident. Cash stated, "He'll talk about seeing his mama laying there on top of him with her mouth open and blood gushing and him calling for her and she wouldn't answer him. It's bothered him a lot." Cash also believed that the Defendant should serve all eight years in prison. On cross-examination, Cash testified that he lost his job when he decided to stay at the hospital with his children. He has, however, found a new job.

The Defendant testified that he was sorry for his actions. He recognized the pain he caused the victim's children, and he stated he would give his life for that of the victim. The Defendant testified that prior to the accident he worked for the City of Newport for twenty-eight years. Although he lost his job with the city after the accident, he felt sure he could find a new job if he were released for part of his sentence. In describing his drinking habits, the Defendant stated that he drank mostly at home. He would attend alcohol counseling if the court directed him to do so. The Defendant also stated that he admitted to charges that did not appear on his pre-sentence report.

The trial court considered the Defendant's pre-sentence report, which stated that he appeared intoxicated at the scene, and he smelled of alcohol. His blood alcohol level, taken later at the hospital, was .19. The Defendant's version of the events are in the pre-sentence report verbatim as follows:

> I had took a vacation day from work, me and my wife had been arguing on and off for a week or so. It had gotten to the point she was moving out. On the morning that I had the wreck, I was upset about that, we have been together almost all of our adult life (28 years). When she packed up my son and I went riding around with him driving, I had no intentions of driving at all I had drank a few beers, had not eat all day. We ended up back at our house, he was waiting on his son and girlfriend to come by. I was going to stay home. I was invited to a cook-out and foolishly I left the house driving. I was going to spend the night at friends. I had no intention to be driving after I got there. When I left the house that day I didn't drive but a few miles,

> when I had the wreck, I saw the light being green, but it must have changed, making it the worst day of my life and the other families. I am as sorry as I can be for the children also, thank God I didn't kill anyone else. If I had the choice I wish it could have been me that died instead of the lady. I just want to get all the help I can for my alcohol problem while incarcerated, and when I get out, either "AA" or any and everything I can. I never want to hurt anybody again. No matter how much time I have to do, I have a lifetime of remembering. I just want to have the chance to be a productive citizen again. I can only hope and pray. The only times I ever messed up was when I was younger. I am now 48.

The pre-sentence investigator located no prior offenses, but the Defendant admitted to two charges of simple possession of a controlled substance, public intoxication, carrying arms, and simple assault. The Defendant stated these offenses took place twenty to twenty-five years ago.

The Defendant reported to the pre-sentence investigator that he never sought treatment for alcohol despite a long history of abuse. He began using marijuana at age fifteen and alcohol at age sixteen. Although the last reported use of alcohol was the day of the accident, prior to that he consumed twelve to eighteen beers almost every day. He used marijuana "often," only quitting "because he had a job of twenty-eight years to think about." Alcohol was a major factor in his marital problems. In summary, the pre-sentence report stated that, "The Defendant, although having virtually no criminal record, would be considered a high risk for completion of supervised release without some intensive treatment for his alcohol dependency."

Based on this evidence, the trial court found that the Defendant's blood alcohol level was over twice the legal limit, and he had a history of alcohol abuse. Although the Defendant was very sorry for what he did, a mother lost her life and her children were injured. The court noted that the Defendant was eligible for alternative sentencing, but "the case cries out for incarceration" because of "the damage done to one family, a mother dead, a child seriously injured, two others lucky in avoiding serious injury, the high level of intoxication, and the carnage inflicted upon a road in Cocke County, Tennessee." As such, "anything other than incarceration would seriously depreciate the seriousness of the offense and the depth of this crime." The trial court ordered the Defendant serve his entire eight-year sentence in prison.

It is from this judgment that the Defendant now appeals.

II. Analysis

On appeal, the Defendant raises one issue: the trial court erred in denying him an alternative sentence. When a defendant challenges the length, range or manner of service of a sentence, this Court must conduct a de novo review on the record with a presumption that "the determinations made by the court from which the appeal is taken are correct." T.C.A. § 40-35-401(d) (2006). As the Sentencing Commission Comments to this section note, the burden is now on the appealing party to show that the sentencing is improper. T.C.A. § 40-35-401, Sentencing Comm'n Cmts. This

means that if the trial court followed the statutory sentencing procedure, made findings of facts which are adequately supported in the record and gave due consideration and proper weight to the factors and principles that are relevant to sentencing under the 1989 Sentencing Act, T.C.A. § 40-35-103 (2006), we may not disturb the sentence even if a different result was preferred. *State v. Ross*, 49 S.W.3d 833, 847 (Tenn. 2001). The presumption does not apply to the legal conclusions reached by the trial court in sentencing a defendant or to the determinations made by the trial court which are predicated upon uncontroverted facts. *State v. Dean*, 76 S.W.3d 352, 377 (Tenn. Crim. App. 2001); *State v. Butler*, 900 S.W.2d 305, 311 (Tenn. Crim. App. 1994); *State v. Smith*, 891 S.W.2d 922, 929 (Tenn. Crim. App. 1994).

In conducting a de novo review of a sentence, we must consider: (1) any evidence received at the trial and sentencing hearing, (2) the presentence report, (3) the principles of sentencing, (4) the arguments of counsel relative to sentencing alternatives, (5) the nature and characteristics of the offense, (6) any mitigating or enhancement factors, (7) any statements made by the defendant on his or her own behalf and (8) the defendant's potential or lack of potential for rehabilitation or treatment. *See* T.C.A. § 40-35-210 (2006); *State v. Taylor*, 63 S.W.3d 400, 411 (Tenn. Crim. App. 2001).

The Defendant's crime was committed on June 15, 2006; thus, his sentence falls under the 2005 amendments to the sentencing act. *See generally* T.C.A. §§ 40-35-401 to 505 (2006). The Defendant's primary conviction, vehicular homicide involving intoxication, is a Class B felony. T.C.A. § 39-13-213(a)(2) (2006). Because the Defendant was convicted of a Class B felony, he is "given first priority regarding sentencing involving incarceration." T.C.A. § 40-35-102(5). He, additionally, does not receive the benefit of Tennessee Code Annotated section 40-35-102(6), which states that those convicted of Class C, D, or E felonies "should be considered as a favorable candidate for alternative sentencing . . . ." Nevertheless, the Defendant is eligible for an alternative sentence because his sentence is less than ten years. T.C.A. § 40-35-303.

Although alterative sentencing must be considered by the trial court, T.C.A. § 40-35-303(b), a defendant is not automatically entitled to an alternative sentence. *State v. Fletcher*, 805 S.W.2d 785, 787 (Tenn. Crim. App. 1991). The burden of proving suitability at the trial court level rests with the defendant. T.C.A. § 40-35-303(b); *State v. Boggs*, 932 S.W.2d 467, 477 (Tenn. Crim. App. 1996). "A criminal defendant seeking full probation bears the burden on appeal of showing the sentence actually imposed is improper, and that full probation will be in both the best interest of the defendant and the public." *State v. Baker*, 966 S.W.2d 429, 434 (Tenn. Crim. App. 1997) (citing *State v. Bingham*, 910 S.W.2d 448, 456 (Tenn. Crim. App. 1995)). "Among the factors applicable to probation consideration are the circumstances of the offense; the defendant's criminal record, social history and present condition; the deterrent effect upon the defendant; and the best interests of the defendant and the public." *State v. Kendrick*, 10 S.W.3d 650, 656 (Tenn. Crim. App. 1999) (citing *State v. Grear*, 568 S.W.2d 285 (Tenn. 1978)).

When considering incarceration, a trial court must consider the following principles:

(A) Confinement is necessary to protect society by restraining a defendant who has

a long history of criminal conduct;
(B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
(C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant.

T.C.A. § 40-35-103(1)(A)-(C). Additionally, the sentence must be no greater than that which is deserved, and it should be the least restrictive measure to achieve the desired goals. T.C.A. § 40-35-103(2), (4). Finally, the trial court is to also consider the potential for rehabilitation. T.C.A. § 40-35-103(5).

The trial court determined that incarceration was necessary because of the Defendant's long history of alcohol abuse, drug use, and to avoid depreciating the seriousness of the offense. Additionally, the court noted the pre-sentence report indicated that the Defendant was a high risk. We, like the trial court, observe that the Defendant only sought to end his dependency on alcohol after the accident, and he only stopped using illegal drugs in order to keep his job. We agree that to allow alternative sentencing in this situation would depreciate the seriousness of the offense. The Defendant admitted knowing he should not have driven, and, as a result of the Defendant's actions, one of the victim's children was forced to watch his mother die. A second child has since regressed in her mental and emotional development. Finally, the Defendant's blood alcohol level was over twice the legal limit. These facts, taken as a whole, support the trial court's determination that the Defendant chose to flagrantly disobey the law and that to allow alternative sentencing would depreciate the seriousness of the offense.

The Defendant cites to *State v. David B. Walker* as a similar case in which this Court remanded the case to the trial court for imposition of an alternative sentence. *See* No. E2005-00234-CCA-R3-CD, 2005 WL 2138249 (Tenn. Crim. App., at Knoxville, Sept. 2, 2005). We find that case distinguishable because Walker was convicted of reckless vehicular homicide, a Class C felony. *Id.* at *1. The Defendant in this case was convicted of vehicular homicide involving intoxication, a Class B felony. This difference is important because, as noted above, a Class B felony does not receive preferential consideration for alternative sentencing as does a Class C felony. T.C.A. § 40-35-102(6).

We conclude that the Defendant did not show the trial court improperly sentenced him. The trial court followed the proper procedure, gave due consideration to the appropriate factors and principles, and imposed a sentence in conformity with the law. When this occurs, "'and [when] the trial court's findings are adequately supported by the record, then we may not modify the sentence even if we would have preferred a different result.'" *Ross*, 49 S.W.3d at 847 (quoting *State v. Pike*, 978 S.W.2d 904, 926-27 (Tenn. 1998)). The Defendant is not entitled to relief.

III. Conclusion

After due consideration of the issues, we conclude that the trial court did not err in denying the Defendant's request for alternative sentencing. As such, we affirm the judgment of the trial court.

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ROBERT W. WEDEMEYER, JUDGE